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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-658

CHARLES COLES DIGGS, *et al.*,

Petitioners.

v.

CIVIL AERONAUTICS BOARD
and
SOUTH AFRICAN AIRWAYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SOUTH AFRICAN AIRWAYS

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Respondent South African Airways respectfully submits this brief in opposition to the petition herein.

STATUTES INVOLVED

In addition to the statutory provisions listed by petitioners, Section 1102 of the Federal Aviation Act, 49 U.S.C. § 1502 (1970), is also relevant:

"In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . .."

QUESTIONS PRESENTED

1. Does Section 1006(a) of the Federal Aviation Act of 1958, 49 U.S.C. §1486(a), which permits appeal of all Civil Aeronautics Board orders except any orders in respect of any foreign air carrier subject to the approval of the President, expressly preclude appellate review of an order by the Board, approved by the President, granting South African Airways a foreign air carrier permit?

2. If not, is the Court of Appeals' decision plainly and readily sustainable on other grounds, including lack of standing of petitioners to bring the action and the manifest correctness of the Board's and the President's decision on the merits?

STATEMENT

By a diplomatic Agreement Relating to Air Transport Service, signed at Cape Town, May 23, 1947, 61 Stat. 3057, T.I.A.S. No. 1591, 66 U.N.T.S. 233, as amended, Nov. 2, 1953, [1953] 4 U.S.T. 2205, T.I.A.S. No. 2870, and June 28, 1968, T.I.A.S. No. 6512 (the "Bilateral Agreement"), South Africa and the United States reciprocally agreed to permit international air service between the two countries by an air carrier of each country. Pursuant to this Agreement South African Airways (SAA) flies into and from New York, just as, pursuant to the same Agreement, Pan American also flies between New York and Johannesburg.

The original Agreement designated specific routes for a United States air carrier, but provided that flights by the South African carrier should be "over such routes as may be determined at a later date." Pan American was promptly designated as the United States carrier, and promptly applied for and received the necessary authorization from the South African authorities. Pan American has conducted regular flights between New York and South Africa since 1947.

In 1967 South Africa sought to implement its right under the Bilateral Agreement to add a South African carrier to participate in air transportation between South Africa and the United States. After a careful and thorough review,[1] the State Department agreed to South Africa's proposal. The 1968 amendment to the Bilateral Agreement designated two routes for a South African carrier. The first such route was described as "South Africa via points in Africa south of the Equator, the Cape Verde Islands, the Canary Islands, Spain and Portugal to New York." The second route was described as "South Africa via points in Africa south of the Equator and South America to New York."

South Africa, pursuant to Article II(A)(1) of the Bilateral Agreement, then designated SAA as its flag carrier to exercise the rights granted to South Africa by the Bilateral Agreement as amended. SAA applied to the Civil Aeronautics Board (CAB), pursuant to Section 402 of the Federal Aviation Act, 49 U.S.C. § 1372, for a foreign air carrier permit to conduct flights over the second route described in the 1968 amendment to the Bilateral Agreement. After public hearing the Board granted such authority. Its order was referred to the President of the United States as required by

[1] See Statement of Frank Loy, Deputy Assistant Secretary of State for Transportation and Communication, in South Africa and United States Foreign Policy, Hearings Before the Subcommittee on Africa of the House Committee on Foreign Affairs 17-26 (91st Cong., 1st Sess. 1969) (hereinafter "Hearings").

Section 801 of the Act, 49 U.S.C. § 1461, and was approved by him on November 7, 1968. Pursuant to that authority, SAA has since February 1969 regularly operated one round-trip flight per week between Johannesburg and New York via Rio de Janeiro.

The proceeding from which the present petition derives was instituted by SAA in 1972 to obtain authorization for flights over the first route designated by the 1968 amendment to the Bilateral Agreement: a route between Johannesburg and New York via the Cape Verde or Canary Islands. The application involved no change in either the origin or destination points of SAA's flights (New York and Johannesburg), but merely a change in the route and intermediate stops between those points. The sole purpose of the application was to allow SAA to fly a route more than 1,200 miles less and two to three flying hours shorter than its then-existing route, with resulting substantial economies and improvements in the service it could render its passengers.

After an administrative proceeding, in which the petitioners intervened and which included a public hearing, the Administrative Law Judge issued a recommended decision to grant the new route (Pet. 10a). The Judge made findings meeting the requirements of Section 402(b) of the Act that SAA be "fit, willing, and able to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest" (Pet. 25a).

On the basis of evidence submitted at the hearing, the Administrative Law Judge found that SAA does not practice racial discrimination in the United States or in its services in international air transportation and, therefore, that SAA does not discriminate in violation of Section 404(b) of the Act, 49 U.S.C. § 1374(b), or Titles II and VII of the

Civil Rights Act of 1964, or engage in deceptive practices under Section 411 of the Act, 49 U.S.C. § 1381 (Pet. 19a-21a).

The petitioners excepted to the recommended decision on the ground that the Administrative Law Judge had improperly excluded evidence concerning racial practices (a) on SAA's intra-South Africa flights; (b) at domestic airport facilities in South Africa (as distinguished from the international portion of Jan Smuts Airport, Johannesburg, where SAA's international flights originate and terminate);[2] and (c) at miscellaneous intra-South Africa facilities not operated by SAA but which American visitors to South Africa might wish to utilize.

The Board adopted the Administrative Law Judge's recommendation (Pet. 4a). The Board concluded that the evidence supported the Judge's finding that the transportation for which SAA sought authority would be performed in conformity with the Act and in the public interest. Specifically, the Board noted that SAA "does not discriminate on the basis of race on any of its international flights" and "it makes its [international] facilities and accessorial services available on a non-discriminatory basis" (Pet. 7a).

Rejecting the petitioners' contention, the Board found that inquiry by it into the operations of a foreign carrier in its home country, and into the internal policies of a foreign government, "would necessarily inject the Board into the complex and delicate diplomatic questions affecting relations between the United States and a friendly foreign nation" (Pet. 8a). Thus the Board determined that it "would neither be practicable nor redound to the benefit of the public interest" to expand the scope of inquiry in a permit

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[2] It is, of course, general if not universal practice for airports serving other countries to contain both international sections and domestic sections, and in the latter for the law of the local sovereign to be fully applicable.

proceeding beyond "an examination of those international services specifically authorized in the applicant's amended permit" *(id.)*.[3]

The President of the United States, pursuant to Section 801 of the Act, approved the Board's order on September 28, 1973. SAA instituted service on the newly authorized route on November 2, 1973, and since that date has operated one round-trip weekly flight on the new route, as well as continuing its pre-existing schedule on the old route.

Petitioners purported to appeal from the President's decision to the Court of Appeals for the District of Columbia Circuit. Respondents CAB and SAA both moved to dismiss the appeal for want of jurisdiction. The Court referred these motions to the panel assigned to hear the case on the merits. After full briefing and argument on the merits, the Court issued its unanimous *per curiam* opinion granting respondents' motions to dismiss (Pet. 1a-3a). From that decision petitioners seek certiorari.

[3] Petitioners appear to claim (Pet. 6-7) that the Board relied on findings by the Administrative Law Judge of non-discrimination in SAA's *internal* flights and facilities. To the contrary, the Board made it wholly clear that it regarded that issue as irrelevant and declined to address it (Pet. 7a-8a).

ARGUMENT

I.

THE DECISION BELOW IS MANIFESTLY CORRECT AND PRESENTS NO QUESTION WARRANTING CERTIORARI.

Section 1006(a) of the Act, 49 U.S.C. § 1486(a), provides that all CAB orders are subject to review in the courts of appeals, *"except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title."* (Emphasis added.) The Board's order here under attack was a recommendation to the President, pursuant to Section 801 of the Act—which is "Section 1461 of this title"—that SAA's application for a foreign air carrier permit be approved. The wholly explicit language of Section 1006(a) requires the result reached below.

The Court of Appeals may not exercise jurisdiction where an act of Congress clearly precludes such jurisdiction. *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); see Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 701(a). Every court which has ruled on the matter has concluded that the express statutory bar of Section 1006(a) deprives the courts of appeals of all authority to review presidentially approved orders in a foreign-air-carrier-permit proceeding, no matter what grounds are urged to support the challenge. *Dan-Air Services, Ltd.*, v. *CAB*, 475 F.2d 408 (D.C. Cir. 1973); *British Overseas Airways Corp.* v. *CAB*, 304 F.2d 952 (D.C. Cir. 1962); see *Pan American World Airways, Inc.*, v.

CAB, 392 F.2d 483 (D.C. Cir. 1968).[4] The law is uniform; there is no conflict among circuits; and the case law is plainly correct.

Petitioners attempt to avoid these simple facts by confusing the issue here with that presented by *Chicago & Southern Airlines, Inc.*, v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), and its progeny. That line of authority deals, not with the express statutory bar against appeals from decisions in foreign-air-carrier-permit proceedings, but rather with the quite different question of judicial reviewability of permits issued to *domestic* air carriers to engage in international air transportation. The statutory bar of Section 1006(a) does not embrace domestic-air-carrier-permit proceedings. Nonetheless, in *Waterman* this Court held that considerations of foreign policy and separation of powers required that presidentially approved orders in these domestic-carrier proceedings be immune from judicial review.

While this Court has never in any subsequent case limited its holding in *Waterman*, two courts of appeals have held that the *Waterman* doctrine does not preclude such review in cases where the Board's statutory authority to enter its order is challenged. *Pan American World Airways, Inc.*, v. *CAB*, 380 F.2d 770 (2d Cir. 1967), *aff'd by an*

[4] In *Pan American* the court, while deciding the case on the merits and thus avoiding disposition of the jurisdictional issue, included in its opinion a thorough analysis of that issue which stressed the formidable obstacles to review and made it clear how that issue would have been decided had decision been necessary. 392 F.2d at 490-93. The court's election not to decide the jurisdictional issue stemmed from the fact that it had before it consolidated actions representing not only a purported direct appeal from the Board's order, but also an appeal from a district-court decision denying mandamus in an action originally brought there. Thus a decision based on the bar presented by Section 1006(a) to direct review of Board orders in a court of appeals would not have avoided the merits, which the court found in any event relatively simple.

equally divided court sub nom. World Airways, Inc., v. *Pan American World Airways, Inc.*, 391 U.S. 461 (1968); *American Airlines, Inc.*, v. *CAB*, 348 F.2d 349 (D.C. Cir. 1965); *Alaska Airlines, Inc.*, v. *Pan American World Airways, Inc.*, 321 F.2d 394 (D.C. Cir. 1963). Petitioners' argument is that these cases somehow cast doubt on or are in conflict with the decisions denying review in the foreign-air-carrier situation discussed above.

The contention is wholly without merit. None of the cases on which petitioners rely involved a foreign air carrier or the express statutory bar which is conclusive here; and, petitioners' contentions notwithstanding, there is nothing in any of the opinions which suggests that the rule they evolved had or could have any application to foreign air carriers. If there is any confusion or conflict in the *Waterman* doctrine and its interpretation by appellate courts, the present case, which does not involve the *Waterman* doctrine at all, is not the proper case to resolve it.[5]

Petitioners assume rather than argue that the test for reviewability should be the same regardless of whether a foreign or a domestic carrier is involved. But there are critical differences between the two situations; Section 1006(a) itself is of course a clear manifestation of Congress' perception of the differences. Treaties and international comity must be considered when a foreign carrier is involved. Judicial interference in the granting of such a permit may, and indeed would in this case,[6] result in the

[5] The opinion below did not even cite *Waterman*, except in a footnote pointing out its inapplicability (Pet. 3a, n.1).

[6] Rejection of SAA's application for a permit on the basis of an examination of internal South African laws and practices, as petitioners urge, would hardly be consistent with the Bilateral Agreement, by which the United States and South Africa agreed to the reciprocal entry of air carriers of each country into the territory of the other. The Bilateral Agreement requires observance of the laws of each contracting party within its own territory (Article V(B)). The action

breach of international agreements by the United States. Judicial review in this area would undoubtedly cause embarrassment to the Executive and interference with the nation's foreign policy.[7]

Interference with the reciprocal air-traffic arrangements between this country and any other nation would surely lead to retaliatory action by the latter, against our air carriers or otherwise, and if based on the considerations urged by petitioners would furnish a mischievous precedent for examination in the courts of one country of the domestic policies and practices of another in violation of the act-of-state doctrine, see *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252-54 (1897). And such interference could not be confined to South Africa; air travel to many other countries would raise similar problems if internal conditions in countries of destination had to be examined by the Board.[8] These are merely a few of the factors which make foreign-air-carrier-permit questions sharply different from questions involving domestic carriers and preclude petitioners' attempt to regard them as fungible for purposes of judicial reviewability.[9]

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petitioners seek would also violate Article I of the Convention Respecting International Civil Aviation (The Chicago Convention), December 7, 1944, 61 Stat. 1180 15 U.N.T.S. 295, which recognizes the "complete and exclusive sovereignty" of every nation within its territory and the air space above it (Article I); see Holmes v. Laird, 459 F.2d 1211, 1216 (1972). Section 1102 of the Act, 49 U.S.C. § 1502, pp. 1-2, *supra*, enjoins the Board to act consistently with international obligations.

[7] See Loy, Hearings, n. 1 *supra*, for a detailed demonstration that the foreign-policy decision to confirm and to implement reciprocal air-traffic rights with South Africa was carefully considered and made with full consciousness of the arguments that could be urged against it, including the very arguments petitioners seek to raise in this proceeding.

[8] Loy, Hearings, n. 1 *supra*, at 25-26.

[9] Petitioners to the contrary, this distinction was recognized in the legislative history of the Act. "There is another power that the

Petitioners appear to argue (Pet. 15-16) that Section 1006(a) was written in light of judicial views current in 1938 as to reviewability; that this Court's decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), has changed those views and broadened reviewability; and that Section 1006(a) should therefore be "interpreted" in the light of that current doctrine. The suggestion is startling. *Baker* v. *Carr*, like *Waterman*, dealt with *judicially self-imposed* limitations in the absence of any statutory bar; nothing in that case or in any other case denies the power of Congress to limit reviewability in the courts of appeals[10] simply because a justiciable question would be present had Congress not so acted. To the contrary, it is wholly clear that the jurisdiction of courts of appeals depends entirely on statute law; see cases cited at p. 7, *supra*. Petitioners' argument is properly addressed to Congress, not to this Court.

Moreover, *Baker* v. *Carr* itself declares criteria for non-justiciability—including "commitment of the issue to a coordinate political department," "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," 369 U.S. at 217—which strongly suggest that the issue here would be held nonjusticiable even in the absence of a statutory bar. On at least two occasions the Executive has specifically determined not to make the in-

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President has, and that is in connection with the issuance of permits to a foreign flag air line to operate to the United States. That is purely international and national defense, and no question has been raised with respect to giving the President any such power as that." Hearings on S. 3760, To Create a Civil Aeronautics Authority, Before the Senate Commerce Committee, 75th Cong., 3d Sess. 7 (1938). The legislative history cited at Pet. 15 contains nothing to the contrary.

[10] As the court below pointed out (Pet. 3a), the question whether petitioners can have their claims adjudicated in an original district-court action is not presented by this case.

ternal affairs of South Africa the basis on which a foreign air carrier permit is granted to or withheld from its flag carrier. The first such occasion was when the Bilateral Agreement here in question was reviewed and implemented in 1968;[11] the second was in 1973, when the President, being fully apprised of petitioners' offer of proof and the Board's rejection thereof, determined to grant the permit. The President obviously shared the view of the Board and the State Department that petitioners' evidence was irrelevant to whether the permit should be granted. Judicial second-guessing of the President in the situation presented here would intrude upon the foreign-relations power, demonstrate a lack of respect due to the presidency, and create grave embarrassment in our relations with a foreign country with whom our relations have been recognized to be particularly sensitive.[12]

II.

PETITIONERS LACK STANDING TO BRING THIS ACTION.

A further reason why the writ should not be granted is that the decision below is plainly sustainable on a ground not reached by the Court of Appeals: petitioners have no "substantial interest" in the subject matter of the litigation, as required for judicial review of CAB orders by Section 1006(a) of the Act, 49 U.S.C. § 1486(a), and indeed lack Ar-

[11] When questioned by Congressman Diggs, petitioner herein, as to whether the Bilateral Agreement should have been implemented in light of South Africa's racial policies which petitioners seek to litigate here, the responsible State Department official testified: "before we signed the amendment to the agreement in 1968 we considered in the Department with some care the very kinds of questions that you are raising," and explained in detail why notwithstanding those questions the foreign-policy decision was to proceed with reciprocal air rights. Loy, Hearings, n.1 *supra*, at 21-26.

[12] David Newsom, Assistant Secretary for African Affairs, Department of State, "Southern Africa: Constant Themes in U.S. Policy," LXVII Dep't. of State Bull., No. 1726, at 120 (July 24, 1972).

ticle III constitutional standing. *E.g., Warth* v. *Seldin*, 43 U.S.L.W. 4906 (U.S. June 25, 1975); *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. 208 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Petitioners have never alleged that any individual petitioner or any member of the petitioner organizations has been injured or will be injured by any of the internal South African practices they seek to challenge, let alone by the Board's decision here at issue.[13] They have alleged merely interest in racial discrimination in general[14] and political opposition to the South African government; these are not enough.

Those petitioners who are members of Congress have likewise alleged only a generalized "interest in a problem," *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739, rather than any of the particularized types of responsibilities and concrete injuries which have been held required in those few cases in which members of Congress have been held to possess standing for reasons connected with their legislative duties.[15]

[13] The Board's decision merely allowed SAA to add *a new intermediate route* to its pre-existing service between the same points of origin and destination; see p. 4, *supra*. Even if a petitioner were harmed by (voluntarily) flying to South Africa and subjecting himself to internal conditions there, he is hardly harmed by the fact that some flights now go to Johannesburg via the Cape Verde Islands rather than via Rio de Janeiro.

[14] They describe themselves merely as having "particular concerns about possible United States involvement in policies of racial discrimination affecting American citizens" (Pet. 5, n.1).

[15] Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973). In each of these cases specific, particularized responsibilities of the plaintiff members of Congress were held to give them standing. Where, as here, such responsibilities are absent, standing is denied to members of Congress. Public Citizen v. Sampson, 515 F.2d 1018 (D.C. Cir. 1975), *aff'g* 379 F. Supp. 662 (D.D.C. 1974); Stokes v. General Services Administration, 515 F.2d 1018 (D.C. Cir. 1975); Holtzman v. Schlesinger, 484 F. 2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

III.

PETITIONERS' STATUTORY AND CONSTITUTIONAL ARGUMENTS AGAINST THE BOARD'S ORDER ARE WITHOUT SUBSTANCE.

Even if this Court should consider the question whether foreign-air-carrier-permit presidential decisions are subject to judicial review as worthy of its attention, an appropriate case for that purpose would be one where petitioners raised substantial questions that the Board and the President had acted beyond the scope of their statutory authority or in violation of the Constitution. This is plainly not such a case. Petitioners' arguments on the merits border on the frivolous.[16]

Petitioners "do not question in this proceeding the power of the President to authorize the route in question once an adequate record has been created by the Board" (Pet. 17). They claim only that the Board and the President erred in failing to consider the evidence they offered, which dealt with internal conditions in South Africa. Such a claim hardly rises to the level of excess of statutory or constitutional authority.

Petitioners' statutory claim is that under Section 402(b) of the Act, 49 U.S.C. § 1372(b), the issuance of a permit must be found to be in the "public interest," and that this provision required the Board to accept evidence concerning internal conditions in South Africa. But this Court has held that administrative agencies should not inquire into the internal affairs of a foreign country absent express congressional direction to do so, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), and that legislation applies

[16] We note that the Court of Appeals required full briefing and argument on the merits before granting respondents' motion to dismiss.

only within the territorial jurisdiction of the United States unless Congress clearly indicates an intent to the contrary, *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *Foley Bros., Inc.*, v. *Filardo*, 336 U.S. 281, 285 (1949); *Blackmer* v. *United States*, 284 U.S. 421 (1932); *Restatement (2d), Foreign Relations Law of the United States* § 38 (1965). Such inquiries "would inevitably lead to embarrassment in foreign affairs" and would raise "questions of such international import . . . as to invite retaliatory action from other nations," *McCulloch* v. *Sociedad Nacional, supra*, 372 U.S. at 19, 21 — language particularly applicable here. Thus the Board had no jurisdiction to inquire into the matters petitioners sought to raise and, even if it had, properly determined not to exercise such jurisdiction.[17]

Petitioners' constitutional claim is that alleged racial discrimination in purely internal facilities within South Africa is "state action" by the CAB in violation of the Fifth Amendment, since the Board has granted SAA permission to fly between Johannesburg and New York. The claim is wholly without merit in view of this Court's decisions in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Columbia Broadcasting System, Inc.*, v. *Democratic Nat'l Committee*, 412 U.S. 94 (1973). Here the CAB does not even regulate the internal South African facilities with which petitioners are concerned; as the Board noted in its decision, its regulatory power is limited to the international transportation which is completed when the international flights end (Pet. 7a-8a).

[17] The Board's action was consistent with its policy in analogous situations. See Pan American World Airways, Inc., v. CAB, 392 F.2d 483 (D.C. Cir. 1968). Here the Board's decision was further warranted by Section 1102 of the Federal Aviation Act (pp. 1-2, *supra*), requiring the Board to exercise its functions in accordance with treaty obligations of the United States.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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